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OCT 18 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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October 18, 1996

DOCKET FILE COPY ORIGINAL

Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Section 257 Proceeding to Identify and Eliminate
Market Entry Barriers for Small Businesses (GN Docket No. 96-113)

Dear Mr. Caton:

On behalf of Mobile Communications Holdings, Inc. (MCHI), I am submitting herewith a copy of a bi-partisan Congressional letter, which we understand was sent on October 17, 1996, to Chairman Hundt. The letter, which is dated October 3, 1996, supplements a July 19, 1995 letter (a copy of which is also enclosed), and is relevant to matters being considered in the Commission's omnibus Section 257 proceeding. The October 3rd letter is signed by Senators Shelby, Craig, Bond, Mack, Heflin, Burns, and Inouye.

Also submitted herewith is a copy of the September 30, 1996 colloquy between Senator Larry Pressler and Senator Richard Shelby, during the floor debate of the 1997 Omnibus Consolidated Appropriations bill.

The enclosed items provide substantial evidence with respect to Congressional intent underlying adoption of Section 257 and Congressional interpretation of Section 257 in the context of a specific market entry barrier, *i.e.*, the Commission's use of a "stringent financial showing" for awarding certain satellite licenses. The letter and colloquy make clear that a strict financial standard for satellite licensing is a market entry barrier to smaller businesses that is contrary to the "spirit and letter" of Section 257. Further, the signatories of the October 3, 1996 letter urge the Commission to "uphold congressional intent to eliminate market entry barriers for small and entrepreneurial businesses" by acting

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Mr. William Caton
October 18, 1996
Page 2

"affirmatively...to suspend the application of such barriers" and to assure a "level playing field" if necessary through "waivers, modifications and other procedural variations."

The colloquy further evidences Congressional concern with the use of stringent financial standards for new satellite services and illuminates Congressional intent, underlying Section 257, to require the Commission to "identify and dismantle impediments to small business ownership and provision of telecommunications services" such as the stringent financial standard. In this regard, Senator Pressler states:

Section 257 directs the Commission to develop meaningful opportunities for small businesses to participate in the ownership and provision of telecommunications services. This language applies to all Commission activities in the area of telecommunications. It does not make exception for activities such as the application of financial qualification standards. (emphasis added)

The enclosed Congressional materials effectively discredit the views expressed by Motorola Satellite Communications, Inc. and L/Q Licensee, Inc. in their October 11, 1996 Reply Comments in GN Docket No. 96-113. See, e.g., Motorola Reply Comments at 2.

It is noted that the views expressed in the Congressional letters and colloquy are also relevant to the Commission's consideration of MCHI's pending application for licensing of the ELLIPSO™ low-Earth orbit mobile satellite system.

Sincerely,


Jill Abeshouse Stern

cc: Attached Service List

United States Senate

WASHINGTON, DC 20510

October 3, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W. Suite 814
Washington, D.C. 20554

Dear Chairman Hundt:

On July 19, 1995, many of the signatories of this letter wrote regarding the use by the FCC of a "stringent financial showing" as a major criterion for granting mobile satellite system (MSS above 1 Ghz) licenses. We expressed our concern that such a test appeared to unduly constrain future marketplace competition and effectively precluded the public from enjoying the subsequent benefits of such systems. We noted further that existing law does not appear to support the use of the financial standard in the MSS case, that the FCC's definition appears unfairly biased towards large asset companies, and that it places an unfair burden on small firms.

The July 19 letter, which we urge you to review once more, noted our national policy, that America has led the world in new and innovative technology and that our laws and implementing regulations continue to change in order to provide an environment for proactive entrepreneurs. The letter further said that "We should not interfere with that process unless there is irrefutable proof that forbearing such criteria as outlined above will negatively impact upon the public marketplace. By implementing the financial standard for MSS licenses, we believe that the FCC has unintentionally created an artificial barrier which effectively denies future public access to lower cost services and stifles small company entrepreneurship from which much of past innovative technology has emerged."

The only reply received in response to the letter was dated August 22, 1995, from Mr. Caton, the FCC's Acting Secretary. The reply was non-substantive.

On April 24, 1996, the Small Business Administration sent a letter to the Commissioners elaborating on many of the same concerns we earlier had expressed to you, emphasizing in particular the unfairness of the "two-tier financial qualification system," and urging the Commission to "reexamine its overly stringent financial qualification standards for smaller companies, in general."

Since our July 19, 1995 letter was sent, The Telecommunications Act of 1996 has been signed into law. Section 257 of that Act directs the FCC to identify and eliminate market entry barriers for entrepreneurs and other small businesses in the provision and

ownership of telecommunications services. In light of this provision of law, the FCC should not create additional market entry barriers in the implementation of its own rules and orders. Furthermore, the FCC should, in the spirit and letter of that law, affirmatively act to suspend the application of such barriers.

Our expressed concerns have been exacerbated as a result of DISCO I, adopted on January 19, 1996, which extends the strict financial qualifications standards to separate satellite systems. These policies represent a dramatic departure from prior satellite policies and rules which have successfully encouraged innovation, competition, and entrepreneurship in the satellite industry. A more flexible financial standard would encourage new, diverse satellite services and operators, thereby promoting competition, innovation and lower consumer prices.

In addition, in the Order of June 27, 1996, the FCC denied appeals in the Big LEO proceeding, refused on narrow, technical grounds to apply Section 257 of the Telecommunications Act, and failed to acknowledge the fact that the SBA had put forward cogent arguments which were entitled to a reply. Contrary to the assertion made in that Order, the provision of additional time for small business applicants to meet the stringent financial standards is not a meaningful remedy to this burden.

We urge the FCC to uphold congressional intent to eliminate market entry barriers for small and entrepreneurial businesses and to do so whenever the inequities appear which led Congress to act. Congress, in such matters, has determined the public interest which should guide the FCC. The Commission possesses the authority—including waivers, modifications and other procedural variations—to assure, even in current proceedings, a level playing field for small businesses, entrepreneurs and similar entities. We request that the FCC review and reconsider the decision to apply the "stringent financial showing" test in the Big LEO proceedings.

We ask that you commit your early and urgent attention to this matter.

Sincerely,

Richard Shelby

Jeffrey

Jeff Bond

Howell Heflin

Sam Brownback

Mike

Conie Mach

Act to pay for the costs of administering plans, amendments and regulations that include IFQ programs results in the repeal of section 208. Because the VBA program that Senator MURRAY has described fits within the definition of an IFQ, upon enactment of the Sustainable Fisheries Act, the moratorium in section 208 will no longer be applicable to the VBA program.

As I mentioned in my discussion with Senator MURRAY about section 208, the Sustainable Fisheries Act's express authorization of fees to pay for the costs of administering plans, amendments and regulations that create IFQ programs results in a repeal of section 208. Once the President signs the Sustainable Fisheries Act, section 208 will be completely repealed.

Mr. SHELBY. Mr. President, I want to congratulate the chairman for reporting out a bill that provides funding for many important programs, while at the same time moving toward our goal of balancing the budget. Of particular interest to me, this bill funds the activities of the Federal Communications Commission which is currently undertaking the important task of implementing the historic Telecommunications Act of 1996.

Mr. President, I would like to raise a concern that many of us have relating to the FCC's implementation of the act, and I would therefore ask the indulgence of the chairman of the Appropriations Subcommittee to allow me to enter into a colloquy with the chairman of the authorizing committee, the Committee on Commerce, Science and Transportation.

Mr. SHELBY. I thank the chairman. In addition to advocating a regulatory framework that encourages and promotes competition in the telecommunications industry, I have been particularly concerned that small and entrepreneurial firms are allowed to compete on a level playing field in all industry sectors in the United States and global economies. Indeed, with passage of the Telecommunications Act, Congress sought to provide opportunities for small businesses to participate in the telecommunications industry while also moving the entire industry toward a more competitive framework overall. Section 257 of the Act directs the FCC to "identify and eliminate * * * market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services. * * *

Mr. President, this is very clear and precise language and should leave no question as to the intent of Congress on matters relating to small businesses. Nevertheless, it has come to my attention that the FCC, in two recent rulemaking decisions relating to new satellite services, has adopted stringent financial standards, the practical effect of which is to erect market entry barriers to telecommunications ownership by entrepreneurs, small businesses and similar entities.

Under the Commission's strict financial standard, applicants are required

to demonstrate financial qualifications either on the basis of a corporate balance sheet or alternatively, on the basis of fully negotiated, irrevocable funding commitments from outside sources. This standard unfairly favors large corporations who may submit a balance sheet as part of their licensing application, regardless of whether the funds reflected on paper are actually committed to the project and even though the corporate giant, like its smaller competitors, will likely turn to external financiers and investors to ultimately fund its system. In fact, the award of all satellite licenses in one of the proceedings I refer to have gone to large corporations. In contrast, applications from small entrepreneurial companies have been deferred because they have been held to the stricter test requiring proof that funds have been irrevocably committed by others on behalf of their entire project. This is a very high hurdle to clear.

Although numerous small businesses, as well as the Small Business Administration and a number of U.S. Senators and Congressmen, have raised concerns about these strict financial standards with the FCC, we have received no adequate response from the FCC, nor has the Commission modified its policy in this area.

To the distinguished chairman of the Commerce Committee I ask: Was it the intent of Congress with passage of the Telecommunications Act of 1996 to encourage the FCC to ease the regulatory framework and encourage competition in the telecommunications industry? And, further, was it the intent of Congress that regulations that act as market entry barriers to small and entrepreneurial businesses be identified and eliminated as soon as possible?

Mr. PRESSLER. The Senator is correct. The primary thrust of the historic act was to ensure increased competition in the telecommunications industry by scaling back regulations and allowing free market forces to operate in this area. The Senator is also correct in noting that section 257 of the act specifically directs the Commission to identify and dismantle impediments to small business ownership and provision of telecommunications services.

Mr. SHELBY. Thank you very much, Mr. Chairman. Any may I then ask: Is it true that section 257 of the Telecommunications Act, which ensures that small businesses are not unfairly disadvantaged by Federal regulations, was supported by both parties?

Mr. PRESSLER. The Senator is correct. This provision, which originated in the other body, was agreed to on a bipartisan basis. Section 257 directs the Commission to develop meaningful opportunities for small businesses to participate in the ownership and provision of telecommunications services. This language applies to all Commission activities in the area of telecommunications. It does not make exception for activities such as the application of financial qualification standards.

Mr. SHELBY. Mr. President, I have one final question for the chairman of the Commerce Committee for purposes of clarifying that the intent of Congress with the Telecommunications Act is to ensure that the marketplace, not the U.S. Government or a regulatory body, decides who the winners and losers in this industry will be. In the case of the strict financial standard imposed by the FCC for satellite system applicants, it seems to me that rather than making a judgment on what the FCC may feel is a company's financial ability to compete, perhaps the FCC should focus more on technical considerations for licenses, leaving the ultimate success or failure of an applicant to the marketplace where it appropriately belongs. Will the chairman continue to work with me and others to ensure that the FCC implements the law according to our intent, particularly as this relates to small and entrepreneurial ventures and financial standards applicable to these important participants?

Mr. PRESSLER. I can assure my colleagues that the Commerce Committee will closely follow actions taken by the Commission in areas such as satellite licensing to ensure that the intent of Congress is carried out. Congress must ensure that the FCC's actions are complementary, not contrary, to the forces of the free market and open competition.

Mr. SHELBY. I thank the chairman of the Commerce Committee for all the work he has undertaken to ensure the American people have access to services which are developed in a free and open marketplace, and I thank the chairman of the Appropriations Committee for permitting our discussion of this most important and timely issue.

WHITEFISH POINT LIGHTHOUSE LAND CONVEYANCE

Mr. ABRAHAM. Mr. President, I rise to address the inadvertent omission of important report language relating to the transfer of the lighthouse at Whitefish Point, MI, from the Coast Guard Authorization Act of 1996.

Built in 1849, the lighthouse at Whitefish Point was Lake Superior's first lighthouse. As I am sure my colleague from Michigan, and anyone else familiar with the perils of maritime transport on Lake Superior will tell you, in its 15 decades of operation the lighthouse has undoubtedly saved hundreds of lives.

In response to the present need to justify budgets, the U.S. Coast Guard, working to meet its numerous national priorities, decided to permit the transfer of ownership to responsible parties. Several organizations stepped forward, and this legislation makes possible the transfer of this historical site to three interested parties: the Great Lakes Shipwreck Historical Society, the U.S. Fish and Wildlife Service, and the Michigan Audubon Society.

Disagreements arose between the interested parties over the ability to construct or expand facilities at the site.

United States Senate

WASHINGTON, DC 20510

July 19, 1995

Mr. Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Dear Mr. Hundt:

The Congress is currently working on legislation to enable and promote more competition in the telecommunications marketplace because technology has rapidly made the existing law and subsequent regulatory implementation obsolete.

The recent use by the FCC of a "stringent financial showing" as a major criterion for granting mobile satellite system (MSS) licenses appears to unduly constrain future marketplace competition and effectively preclude the public from enjoying the subsequent benefits for such systems.

The use of financial data as a criterion evolved from 47 CFR 25.140 and is based on protecting the public from a financially weak applicant. It assumes 1) the spectrum in question is in high demand and cannot support every applicant, and, 2) the award to a financially weak applicant precludes another applicant from receiving a license thereby "injuring the public" by delaying the availability of a financially stronger applicant's services.

While the "Big LEO" spectrum is in demand, the use of Code Division Multiple Access (CDMA) and digital technology, which four of the applicants are promoting, allows multiple use of the spectrum without interference and mitigates former concerns regarding "one applicant, one slot". Nonetheless, the FCC, in its 31 January, 1995 ruling, chose to defer licenses to two technically qualified applicants based on their inability to convince the FCC of their "stringent financial showing". Both have systems that forecast public access to lower cost services.

In addition, the FCC's ruling by definition appears unfairly biased towards large asset companies since they can claim to use internal funding sources and are not required to show "irrevocable commitment" by financial patrons. In contrast, smaller firms, who by necessity must plan to finance their

projects from largely external sources, must show the financial source's "irrevocable" commitment. In short, the FCC appears, on the basis of protecting the public, to have assumed the role of business expert in determining the standards to meet the criterion. Having done that, the burden of proof falls squarely on the back of the applicant.

This situation quickly becomes a "Catch-22" for small firms because banking and financial institutions who are more expert at evaluating financial risk than the government can now consider the FCC decision as a negative event - an event that impacts their decision to follow through with preplanned support. The smaller companies' only strong suit with its external sources is the innovative excellence of its planned product. In this competitive environment, absent a trust fund, there are no "irrevocable commitments".

Historically, America has led the world in new and innovative technology. Our laws and implementing regulations continue to change in order to provide an environment for proactive entrepreneurs, who must plan on external financing, joint ventures, and partnerships, to succeed. We should not interfere with that process unless there is irrefutable proof that forebearing such criteria as outlined above will negatively impact upon the public marketplace. By implementing the financial standard for MSS licenses, we believe that the FCC has unintentionally created an artificial barrier which effectively denies future public access to lower cost services and stifles small company entrepreneurship from which much of past innovative technology has emerged.

Accordingly, we respectfully request your personal review, and that of the other commissioners, of the 31 January 1995 decision regarding the applicants whose request for license was deferred. We urge you to consider approval of those applicants that did show significant preplanned support comparable to the non-committed assets of applicants whose licenses were approved. We would most appreciate the results of your decision and review within 30 days...

Sincerely,

Richard Shelby
Lyne Craig
Conrad Black

Frank Lott
Paul Vachon
Conrad Black

CERTIFICATE OF SERVICE

I, FELECIA G. DELOATCH, do hereby certify that a true and correct copy of the foregoing document was sent by first-class mail, postage prepaid, or hand-delivered, on this 18th day of October, 1996, to the following persons:

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A handwritten signature in cursive script, appearing to read "Eric E. Breisach", written over a horizontal line.